

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

**SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, AND THOMAS L. CLARKE,
DIRECTOR, DIVISION OF MINING
AND RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Plaintiffs,

v.

Civil Action No. 10-C-191

ARGUS ENERGY WV, LLC,

Defendant.

CONSENT DECREE

Upon agreement to the terms herein by the parties, Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director of the Division of Mining and Reclamation (hereinafter collectively, the "Directors") of the West Virginia Department of Environmental Protection (hereinafter "WVDEP") and Argus Energy WV, LLC (hereinafter "Argus"), the parties agree that it is their intent to resolve the violations of the West Virginia Water Pollution Control Act ("WPCA"), West Virginia Code §§ 22-11-1 *et seq.*, and associated violations of the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA"), West Virginia Code §§ 22-3-1 *et seq.* (collectively, the "Acts"), and violations of the rules and regulations implementing these Acts through this Consent Decree with stipulated penalties and other duties imposed as expressed herein. After consideration of public comments on this Consent Decree, as proposed, and the parties' responses thereto, the Court enters this Consent Decree.

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code §§ 22-11-22 and 22-3-17.
2. Venue is proper in this Circuit Court pursuant to W. Va. Code §§ 22-11-22 and 22-3-17 because Argus is located and doing business in this judicial circuit and because the violations of the Acts and the rules promulgated pursuant to the Acts that are the subject of this action occurred in this judicial circuit.

II. APPLICATION OF CONSENT DECREE

3. This Consent Decree applies to and is binding upon WVDEP and Argus and its successors, as both the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter "WV/NPDES") Permit No. WV1020013 (the "NPDES Permit") and the permittee of Surface Mining Permit No. S-5026-98 (the "SCMRA Permit").

III. FINDINGS OF FACT

4. The Directors filed a Complaint, and then an Amended Complaint (hereinafter "Complaint"), in the Circuit Court of Mingo County, West Virginia, against Argus as set forth above in the caption of this Consent Decree. The Complaint alleges that Argus violated the WPCA and the SCMRA through discharges of pollutants from its surface mining facility in Mingo, Lincoln, and Logan Counties, West Virginia, which is covered by the NPDES Permit. The SCMRA Permit authorizes surface mining at this mine and the NPDES Permit authorizes discharges from the mine.

Statutory and Regulatory Background

5. WVDEP issued the NPDES Permit pursuant to its authority under the WPCA and pursuant to authority delegated to the WVDEP by the United States Environmental Protection Agency ("USEPA") under the federal Clean Water Act, 33 U.S.C. § 1342, and pursuant to a Memorandum of Agreement between the WVDEP and USEPA for the issuance of NPDES permits.
6. The NPDES Permit contains limits on the concentrations of certain pollutants that can be discharged in the effluent from the mine.
7. Argus has reported the quality of its discharges and other information to the WVDEP pursuant to the terms and conditions of the NPDES Permit. This reporting has occurred through submittal of monthly Discharge Monitoring Reports (hereinafter "DMRs") as prescribed by the WVDEP.
8. Argus's surface mining operation is also covered by the SCMRA Permit, which WVDEP originally issued on June 30, 1999.
9. The WVDEP issued the SCMRA Permit pursuant to its authority under the SCMRA and its status as the primary and exclusive regulator of coal mining in West Virginia. The exclusive regulatory jurisdiction under surface mining law is the result of the United States Office of Surface Mining, Reclamation and Enforcement's approval of the state's regulatory program in January 1981. WVDEP obtained its regulatory primacy by passing a law, SCMRA, which met or exceeded the minimum national standards established by Congress and by demonstrating its capacity to enforce its law. *See* 40 C.F.R. §§ 732.12 and 948.10.

10. The rules promulgated by the WVDEP implementing SCMRA prohibit violations of effluent limitations contained in a WV/NPDES permit and prohibit any violation of water quality standards. *See* W. Va. Code St. R. § 38-2-14.5.b.

Violations of Effluent Limits

11. The WVDEP's review of DMRs submitted by Argus for the period from June 1, 2007 through June 30, 2011 identified results for total aluminum in the review period that were in excess of the effluent limits in the NPDES Permit; however, these exceedances were previously the subject of a civil administrative penalty imposed pursuant to Consent Order No. M-09-043 between WVDEP and Argus. Consent Order No. M-09-043 covered exceedances of WV/NPDES permit limits at the NPDES Permit prior to April 2009. Consent Order No. M-09-043 is incorporated by reference into this Consent Decree, and the WVDEP hereby confirms that the penalty assessed by the agency, and paid by Argus, pursuant to Consent Order No. M-09-043 was based upon the factors set forth in Article VI herein, and was adequate and reasonable. WVDEP has reviewed the DMRs for all of the outlets at the NPDES Permit, including those DMRs from the period covered by Consent Order No. M-09-043, and the parties agree that specific corrective action and/or compliance steps are appropriate for the Outlets and parameters listed in Paragraph 36(ii), below.

12. In its review of Argus's DMRs, the WVDEP also identified sample results for selenium at Outlets 006 and 009 higher than the final effluent limits for selenium contained in the NPDES Permit. In the WVDEP's view, those results would have been violations of the NPDES Permit but for (a) an order by the Environmental Quality Board staying the implementation of the NPDES Permit's final effluent limits for selenium and (b) an order from the Circuit Court of Kanawha County prohibiting the final effluent limits for selenium from becoming effective until the WVDEP

takes final action on Argus's permit modification request, and Argus has the opportunity to file an appeal of any such action, as described in Paragraphs 27 and 28 below.

Selenium Effluent Limits

13. The NPDES Permit contains 48 permitted outlets. Of those, only Outlets 006 and 009 currently have effluent limits for selenium. Selenium was first added as a parameter of concern when the NPDES Permit was reissued on June 12, 2006. At that point, the WVDEP imposed a "monitor only" requirement for selenium for Outlets 006, 009 and 015 until May 12, 2009, at which point final effective limits of 8.2 *ug/l* for the daily maximum limit and 4.7 *ug/l* for the average monthly limit would go into effect.

14. On or about April 5, 2007, the WVDEP modified the compliance schedule in the NPDES Permit such that Argus was required to report selenium levels in the effluent from Outlets 006, 009 and 015 until April 5, 2010, with the final limits of 8.2 *ug/l* for the daily maximum limit and 4.7 *ug/l* for the monthly average limit thereafter scheduled to go into effect on or about April 5, 2010.

15. From June 2006, when Argus began sampling for selenium pursuant to the NPDES Permit, until September 2008, the discharges from Outlets 006, 009 and 015 did not have any sample results for selenium that exceeded the final selenium monthly average limit of 4.7 *ug/l*. Accordingly, for at least two years after selenium first was included as a parameter of concern in the NPDES Permit, Argus had no reason to believe that any additional treatment would be necessary to ensure compliance with the final effluent limits for selenium. On the contrary, Argus's data during that period supported its belief that selenium actually should be deleted as a parameter of concern for the NPDES Permit.

16. Because data during this period showed that the discharges from Outlets 006, 009 and 015 were not causing or contributing to violations of the water quality standard for selenium, Argus submitted a permit modification request to delete selenium as a parameter of concern from the NPDES Permit. While the WVDEP was reviewing this request, however, Argus's sample results began showing fluctuations in the levels of selenium in the discharges from Outlets 006 and 009.

17. The WVDEP approved Argus's modification request as to Outlet 015. Due to the intermittent instances of higher selenium levels at Outlets 006 and 009, the WVDEP denied the proposed deletion of selenium as a parameter of concern for those outlets.

18. Following the first elevated selenium results at Outlets 006 and 009 in September 2008, Argus's analysis of the sampling results revealed sporadic exceedances of the not-yet-effective final limits, but no consistent pattern emerged. In light of the sporadic selenium results above the NPDES Permit's final limits, however, Argus began evaluating potential selenium treatment options in addition to its existing treatment, and thereafter initiated a pilot treatment project due to the likelihood that existing treatment systems at Outlets 006 and 009 could not be guaranteed to ensure compliance with final selenium effluent limits by April 5, 2010.

19. Beginning in 2009, Argus began spraying iron-rich sludge from its acid mine drainage treatment system onto the surface of the pond associated with Outlet 006. The purpose of this pilot treatment program was to demonstrate that the iron in this sludge would bind to the selenium in the effluent similarly to the zero-valent iron treatment technologies being piloted at various locations throughout West Virginia. Argus compared the results after treatment to the levels before treatment and also compared the results from Outlet 006, where the pilot project was located, to those from

Outlet 009 where no iron-rich sludge was being added. The results of this pilot treatment indicated that treatment with iron-rich sludge served to reduce selenium levels.

20. Argus then began to administer the iron-rich sludge in a systematic way with the goal of creating an environment in the treatment ponds where selenium levels would be reduced proactively. Argus then modified the iron media delivery system by administering iron media via pellets added at regular intervals. Argus installed treatment systems at both Outlets 006 and 009 and began using two different forms of iron media to compare their effectiveness in reducing the levels in selenium in the effluent. All of the flow through Outlets 006 and 009 receives treatment before discharging. This demonstration is ongoing on a full scale basis, and results are encouraging. Nevertheless, Argus has not been able to completely eliminate the fluctuations in the selenium levels at Outlets 006 and 009 such that selenium levels are consistently below the NPDES Permit's final effluent limits. Accordingly, Argus has been exploring additional means to improve the effectiveness of the iron media treatment system, which has had encouraging results to date with respect to reducing selenium levels.

21. Argus has also continued to evaluate various outlets' selenium levels over time to understand and address problem areas, and continues to evaluate other treatment options in the event that the current treatment approach proves unsuccessful, including, but not limited to, reviewing several different types of zero-valent iron treatment technology, microbial/biological treatment technology and the active treatment systems being piloted or installed by other coal companies.

22. The parties agree that the information available to them, including information related to Argus's treatment efforts, provides a reasonable basis upon which to conclude that Argus will

achieve compliance with its final selenium effluent limits by the dates set forth in Paragraph 36(ii) herein.

23. Argus has also conducted extensive studies and research into the source and effects of selenium in the watersheds in which it operates.

24. Despite Argus's good faith efforts to come into full compliance with its selenium effluent limits by April 5, 2010, Argus could not do so.

25. In January 2010, Argus filed a request to modify the NPDES Permit to extend the final effective date for the selenium effluent limits for Outlets 006 and 009.

26. In February 2010, the WVDEP issued a draft permit modification based on Argus's application and commenced a public comment period on the proposed modification. Prior to the close of the public comment period, the USEPA filed a general objection to the WVDEP's proposal to grant the permit modification. On May 27, 2010, USEPA filed a specific objection to the requested permit modification. WVDEP was unable to resolve the USEPA's objection, and subsequently the WVDEP denied Argus's modification request.

27. On April 2, 2010, Argus filed an administrative appeal with the West Virginia Environmental Quality Board seeking redress for the WVDEP's failure to timely process its modification application. The Board subsequently granted a stay of the final limits for selenium which were to go into effect on or about April 5, 2010. This appeal is still pending. The Environmental Quality Board has placed this appeal on the inactive docket while WVDEP and Argus pursued resolution of all issues raised in the appeal and this civil action through an omnibus settlement.

28. Argus concurrently filed an action in the Circuit Court of Kanawha County requesting injunctive relief and specifically asking that Court enter an order preventing the final limits for selenium from going into effect, thereby preserving its right to pursue the requested modification and to pursue an appeal based on the agency's action on the application. The Court granted this injunction and it remains in effect.

29. By a Memorandum Opinion and Order dated March 31, 2011 in *Ohio Valley Environmental Coalition, Inc. v. Coal-Mac, Inc.*, --- F. Supp. 2d ---, 2011 WL 1237643 (S.D. W. Va.), the District Court for the Southern District of West Virginia held that stays issued to similarly situated permittees by the Environmental Quality Board and the Circuit Court of Kanawha County were invalid. Because Argus was not a party to this case, the District Court's decision does not invalidate the stays issued to Argus, and Argus believes that the Environmental Quality Board and the Circuit Court of Kanawha County stays were properly issued. Notwithstanding the existence of the stays, however, and for the purposes of this consent decree only, the parties agree that any reported result of selenium above the final effluent limits for selenium stated in the NPDES Permit shall be considered an exceedance of the final effluent limits subject to penalty assessment.

IV. EFFECT OF SETTLEMENT

30. The Parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which Argus has asserted multiple defenses, and further agree that the environmental benefit of an expeditious settlement of this civil action is in the best interest of the parties. As noted in Paragraph 34 below, WVDEP is releasing all of its rights to assert a claim in the future related to any claims asserted in the Complaint for the NPDES Permit and the SCMRA Permit for the period of June 1, 2007 through June 30, 2011. The civil penalty

assessed by the Court in this Consent Decree reflects WVDEP's belief that it could prove violations of effluent limits and other allegations raised in the Complaint as well as Argus's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment.

31. For the purposes of this Consent Decree, Argus agrees the Complaint states claims upon which relief can be granted.

32. The parties have agreed that this Consent Decree and Argus's consent hereto satisfies all claims that may be asserted for civil penalties under the Acts for the discharge of any pollutant regulated by the NPDES Permit from June 1, 2007 through June 30, 2011.

33. The WVDEP has evaluated the DMRs for all permitted outlets, agency records regarding the NPDES Permit, and other related information and has completed an evaluation of Argus's compliance record. In completing this evaluation, the WVDEP has considered whether reported results for any parameter other than selenium that may have been subject to a "report only" requirement were in fact violations of the NPDES Permit or any applicable statutory or regulatory requirement. WVDEP exercised its enforcement discretion in determining that no such exceedances or violations that rise to the level of an enforcement action have occurred here.

34. This Consent Decree shall act as a bar, full accord and satisfaction and have the effect of *res judicata* for any claim or cause of action brought or that may have been brought, including those seeking injunctive relief, for violations of the NPDES Permit and associated violations of the SCMRA Permit and associated performance standards, or violations of water quality standards, during the period from June 1, 2007 through June 30, 2011 pursuant to 33 U.S.C. § 1365(a)(1)(A)

and 30 U.S.C § 1270. SCMRA Permit violations, if any, that are not associated with the NPDES Permit violations resolved herein are not settled or resolved by this Consent Decree.

35. Upon entry of this Decree, Argus agrees to voluntarily withdraw its permit modification request and related administrative appeal and diligently take any other actions reasonably necessary to obtain dismissal of that appeal with prejudice. Argus will also seek to dismiss, with prejudice, the Circuit Court of Kanawha County action, to dissolve the injunction currently in place, and to take any other actions reasonably necessary to obtain dismissal of that action.

V. ORDER FOR COMPLIANCE

36. Now, therefore, in accordance with Chapter 22, Article 11, Section 1, *et seq.*, and Chapter 22, Article 3, Section 1, *et seq.*, of the West Virginia Code, it is hereby agreed between the parties and ORDERED by the Court that Argus shall (i) immediately take measures to initiate compliance with all effluent limits in the NPDES Permit, and (ii) engage in a corrective action plan for selenium treatment at Outlets 006 and 009 as follows:

- a. Argus shall continue developing the treatment projects currently underway (as described in Paragraphs 19 and 20 herein) at Outlets 006 and 009 consistent with the timeframes set forth in the schedule attached as Exhibit 1.
- b. Any treatment systems to be employed at Outlets 006 and 009 shall be designed and implemented in a manner to allow Argus to determine the effectiveness of these treatment systems and to evaluate the potential for these systems to meet the final effluent limits for selenium in the NPDES Permit. Any treatment systems shall be designed and installed in a manner to provide meaningful data, including evaluation of selenium removal efficiencies, related to the effectiveness of the treatment method for

conditions comparable to those anticipated at Outlets 006 and 009 and with consideration of Argus's ability to achieve compliance with final limits.

- c. Argus shall analyze two or more biological / microbial treatment systems currently being pursued or developed at other coal mining facilities for the purpose of identifying additional potential treatment systems to be employed at Outlets 006 and 009 in the event that the current treatment systems being deployed at Outlets 006 and 009 are determined not to be sufficient to achieve the final selenium limits without additional treatment.
- d. Argus shall conclude the evaluation phase of the installed treatment system described in subparagraph a. and shall provide a report on the same to WVDEP by the dates specified in Exhibit 1.
- e. By December 30, 2011, Argus shall designate the treatment systems that it will install at Outlets 006 and 009 of the NPDES Permit to ensure compliance with the final effective limits currently set forth in the NPDES Permit by the dates set forth in subparagraph g. below, or explain in writing any determination that no further treatment system is required at any specific outlet(s) in order to comply with final permit limits. Upon designating any treatment system it will install at Outlets 006 and 009, Argus shall immediately initiate any additional engineering designs and other work necessary to ensure the designated treatment systems will be operational on or before the dates set forth in subparagraph g. below. The selected treatment system will be designed, at a minimum, to treat a one-year, twenty-four hour storm flow event to meet final selenium effluent limits. Argus shall complete construction of any designated treatment systems

for Outlets 006 and 009 by October 1, 2012 as specified in Exhibit 1, provided that Argus may install additional treatment capacity or make other changes or revisions to the constructed treatment systems after the dates set forth above to improve the treatment capacity or efficiency of the treatment systems.

- f. Argus shall hire an independent consultant or consultants to review and analyze its current treatment systems and plans for Outlets 006 and 009 and make recommendations regarding the same. This independent consultant or consultants shall be experienced in the treatment of mine water discharges and shall not have been in the employ of Argus or retained by Argus prior to the date of the filing of the Complaint in this civil action. The independent consultant or consultants shall prepare a report detailing the results of his or her review and making recommendations regarding any alterations and/or maintenance by November 30, 2011, a copy of which shall be sent to the WVDEP.
- g. Argus shall come into compliance with the final effective limits for selenium in the NPDES Permit for Outlets 006 and 009 by November 15, 2012.

VI. CIVIL PENALTIES

37. In settlement of the WVDEP's claims in its Complaint relating to any and all reported violations of the WPCA and the NPDES Permit and SCMRA and the SCMRA Permit for relief under W. Va. Code §§ 22-11-22 and 22-3-17, Argus, without admitting liability for any alleged violations or agreeing to the appropriateness of the civil penalty expressed herein except in the context of this Consent Decree, agrees for purposes of the settlement provided herein that it shall pay a total civil penalty of \$21,000 (Twenty-One Thousand Dollars). This civil penalty reflects consideration by the WVDEP of relevant civil penalty assessment factors, including but not limited

to deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, and history of compliance as set forth below.

- a. Argus shall pay a total cash penalty of \$21,000 by certified or cashier's check to the WVDEP for deposit in the WVDEP's Stream Restoration Fund, payable in three installments of \$7,000 each, with the first such installment due within 30 days of the entry of this Decree, the second such installment due within 60 days of the entry of this Decree, and the third such installment due within 90 days of the entry of this Decree.
- b. Payments shall be mailed to the following address:

Harold Ward, Deputy Director
West Virginia Department of Environmental Protection
Environmental Enforcement
601 57th Street SE
Charleston, WV 25304

VII. INTERIM LIMITS

38. Argus shall have the following interim limits leading to compliance with the final effective limits in its NPDES Permit for Outlets 006 and 009:

Outlet	Phase I Interim Limits Entry date of Decree to April 30, 2012	Phase II Interim Limits May 1, 2012 to November 14, 2012
006	12 ug/l – Daily Maximum	9 ug/l – Daily Maximum 6 ug/l – Average Monthly
009	10 ug/l – Daily Maximum	9 ug/l – Daily Maximum 6 ug/l – Average Monthly

39. The WVDEP shall enforce the interim limits set forth in Paragraph 38 through the stipulated penalties set forth in Paragraph 41 below. The interim limits for Outlets 006 and 009 will terminate on November 15, 2012.

40. For all other parameters and outlets, the WVDEP shall enforce the final effective limits currently listed in the NPDES Permit.

VIII. STIPULATED PENALTIES

41. In the event Argus violates any interim limit for selenium as described in Paragraph 38 above, Argus shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the violation of a Phase I interim limit, Argus shall pay \$1,000 per violation. For the second consecutive violation of a Phase I interim limit which does not show a reduction in the level of selenium from the previous sample result, Argus shall pay \$1,500. For the third consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous sample result, Argus shall pay \$2,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$1,000.
- b. For the violation of a Phase II daily maximum interim limit, Argus shall pay \$2,000 per violation. For the second consecutive violation of a Phase II daily maximum interim limit which does not show a reduction in the level of selenium from the first violation, Argus shall pay \$2,500. For the third consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous violation of the daily maximum interim limit, Argus shall pay \$3,000. Consecutive violations that

evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$2,000.

- c. For each month where selenium is reported as exceeding the Phase II interim average monthly limit, Argus shall pay \$3,000. For the second consecutive month where selenium is reported as exceeding the Phase II interim average monthly limit which does not show a reduction in the level of selenium from the first reported selenium exceedance, Argus shall pay \$5,000. For the third consecutive and subsequent months where selenium is reported as exceeding the Phase II interim monthly average limit, which do not show a reduction in the level of selenium from the previous month, Argus shall pay \$7,500. Consecutive violations that evidence reductions in the level of selenium from the previous month shall be assessed a stipulated penalty of \$3,000.

42. For violation of any final effective limit listed in the NPDES Permit other than the effluent limits for selenium at the Outlets 006 and 009, Argus shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For each of the first three exceedances of the same daily maximum limit for a parameter at the same outfall, Argus shall pay \$1,000.
- b. For each of the fourth through sixth exceedances of the same daily maximum limit for a parameter at the same outfall, Argus shall pay \$1,500.
- c. For each of the seventh through ninth exceedances of the same daily maximum limit for a parameter at the same outfall, Argus shall pay \$2,000.
- d. For the tenth and each subsequent exceedance of the same daily maximum limit for a parameter at the same outfall, Argus shall pay \$3,000.

- e. For each of the first three exceedances of the same average monthly limit for a parameter at the same outfall, Argus shall pay \$2,500.
- f. For each of the fourth through sixth exceedances of the same average monthly limit for a parameter at the same outfall, Argus shall pay \$3,000.
- g. For each of the seventh through ninth exceedances of the same average monthly limit for a parameter at the same outfall, Argus shall pay \$3,500.
- h. For the tenth and each subsequent exceedance of the same average monthly limit for a parameter at the same outfall, Argus shall pay \$5,000.

43. For failure to take or complete any step outlined in the corrective action plan set forth in Article V (“Order for Compliance”) herein, or to submit any payment as required by Paragraph 37 herein, or to submit any report as required by Paragraph 46 herein, Argus shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the 1st through 15th day of noncompliance, Argus shall pay \$500 per day per violation;
- b. For the 16th through 30th day of noncompliance, Argus shall pay \$750 per day per violation; and
- c. For any period of noncompliance after the 30th day, Argus shall pay \$1,000 per day per violation.

Stipulated penalties shall be payable within thirty (30) days of receipt of a written demand from the WVDEP. Such payments shall be made by certified or cashier’s check payable to the West Virginia Department of Environmental Protection and delivered to the address specified in Paragraph 37.b. for deposit in the Stream Restoration Fund.

44. The Phase I stipulated penalties provided in Paragraph 41 shall apply to any selenium result from Outlets 006 and 009 that exceeds the final effective limits in the NPDES permit for the period from July 1, 2011 to the entry of this Consent Decree.

45. The schedule of stipulated penalties provided in Paragraphs 42 and 43 shall be effective from the entry date of this Consent Decree through November 14, 2012.

IX. REPORTS

46. Argus shall provide WVDEP with quarterly reports on the status of its evaluation and/or development of, and installation of selenium treatment systems. These quarterly reports shall include a summary of the sampling results for selenium at Outlets 006 and 009, and analysis developed pursuant to paragraph 36(ii)(c) herein. The quarterly reports shall indicate what has been accomplished since submittal of the prior quarterly report, whether Argus is on the schedule required by this Consent Decree, or, if not on schedule, include an explanation of why Argus is behind schedule, how far it is behind schedule, and what measures are being taken to get back on schedule. The quarterly reports shall also describe activities undertaken pursuant to Section V ("Order for Compliance") of this Consent Decree until all remedial measures described therein are completed. Each quarterly report shall be submitted to WVDEP beginning December 30, 2011, and every three months thereafter until all the conditions set forth in Paragraph 54 are satisfied.

X. FORCE MAJEURE

47. If any event occurs that causes or may cause a violation of any provision of this Consent Decree by Argus, Argus shall notify the WVDEP in writing within ten (10) days of the date on which it had knowledge or should have had knowledge that the event may or will cause a violation. Writing may include the use of electronic mail at an e-mail address provided for the Assistant

Director of the Division of Mining and Reclamation – Inspection and Enforcement. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and/or to be taken by Argus to minimize the violation, and the timetable by which those measures will be implemented. Argus will take all measures to avoid or minimize any such violation. Argus shall make all efforts to identify events that cause or may cause a violation of this Consent Decree.

48. If the WVDEP agrees that any violation of this Consent Decree is caused by circumstances reasonably beyond the control of Argus, Argus shall be excused as to that violation for the period of time the violation continues due to such circumstances. Argus's time for performance shall be extended for a period not exceeding the delay actually resulting from such circumstances. In the event the WVDEP does not agree, then Argus may submit the matter to this Court for resolution. The burden of proving that any delay was caused by circumstances reasonably beyond the control of Argus and the length of such delay shall rest with Argus. Failure by Argus to comply with the notice requirements in Paragraph 47 shall render this paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of Argus's rights under this provision to obtain an extension of its obligations based on that incident.

49. Compliance with any requirement of this Consent Decree, by itself, shall not constitute compliance with any other requirement. Argus must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

XI. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION

50. The Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree until the Decree is terminated as set forth below.

Additionally, should either party believe that the other has failed or is failing to comply with the terms of this Decree, it may petition this Court for a resolution of the issue.

XII. PERMITS AND OTHER LAWS AND REGULATIONS

51. This Consent Decree is not, and shall not be interpreted to be, a permit or modification of a permit under the WPCA, nor shall it relieve Argus of any other obligation imposed by the WPCA, the NPDES Permit, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve Argus of its obligation to comply with any other federal or state law or any rule or regulation in any way related to the substance of this Consent Decree. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

XIII. PUBLIC NOTICE

52. The parties acknowledge and agree that final approval of this Consent Decree is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. Argus shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Consent Decree. The public shall have at least thirty (30) days in which to make any comments on this Consent Decree and the WVDEP reserves the right to withhold or withdraw its consent or to propose modifications to this Consent Decree if warranted based on comments received during the period for public comments. If the WVDEP modifies this Consent Decree in response to public comments, Argus may either consent to, or withhold consent to, entry of the modified Consent Decree. If the WVDEP makes no changes in response to public comments, Argus consents to entry of this Consent Decree without further notice. If for any reason this Court should decline to approve

this Consent Decree in the form presented, this agreement is not binding on and of no effect to the parties.

XIV. EFFECTIVE DATE

53. The effective date of this Consent Decree shall be the date upon which it is entered by the Court as a final judgment and order.

XV. TERMINATION

54. Termination of this Consent Decree shall be by order of the Court upon application by either party, provided that all of the following conditions have been met: (1) Argus has achieved complete compliance with all requirements of this Consent Decree; (2) Argus has paid all stipulated penalties required herein; and (3) all motions and other proceedings concerning this Consent Decree have been completed and are no longer subject to further judicial review and all relief resulting from such motions or other proceedings have been fully satisfied.

XVI. SIGNATORIES AUTHORIZED

Each of the signatories to this Consent Decree certifies that she or he is fully authorized to enter into the terms and conditions of this Consent Decree and to bind legally the party to the Consent Decree so represented by her or him.

It is so ORDERED this _____ day of _____, 2011.

We hereby consent to the entry of this Decree:

Scott G. Mandirola, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection

Date

Thomas L. Clarke, Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

Date

Jonathan C. Frame (WVSB #10182)
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
(304) 926-0499 x. 1702
Counsel for Plaintiff

Date

Allyn G. Turner (WVSB #5561)
Spilman Thomas & Battle, PLLC
Post Office Box 273
Charleston, WV 25321-0273
aturner@spilmanlaw.com
Counsel for Defendant

Date

EXHIBIT 1

OUTLETS 006 and 009

A. Continue scale-up of iron media treatment systems, including testing and adjustments to the rate and concentration of the treatment media being added to the ponds:

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| 1. Meet with Independent Consultant to discuss treatment systems | July 15, 2011 |
| 2. Submit copy of report of independent consultant to WVDEP | November 30, 2011 |
| 3. Complete evaluation of start-up scale treatment system and evaluate alternative selenium treatment technologies, including two or more such technologies being used by other coal companies (shall be included with independent consultant report). | November 30, 2011 |

B. Submit quarterly status report on treatment system efforts to the WVDEP	Quarterly, beginning December 30, 2011
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C. Submit report to WVDEP on final selection of selenium treatment system for Outlets 006 and 009.	December 30, 2011
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D. Initiate design of selected treatment system	January 15, 2012
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E. Submit all necessary permit modification applications to WVDEP, and, if necessary a request for a letter of approval to begin preparatory work before the permit modification application is approved.* (**this will address alternative technologies if determined to be necessary based on C. above**)	February 15, 2012
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F. Begin site preparation and initiate construction of treatment system	May 30, 2012
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G. Complete construction and begin testing of installed treatment system and making any necessary adjustments to achieve final compliance	October 1, 2012
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H. Achieve compliance with final selenium effluent limits	November 15, 2012
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** The parties agree that review and approval of a complete application for this modification should be completed within 90 days of submission, and the subsequent deadlines herein are based on this anticipated timeframe.*

*** Alternative technologies, emerging biological technologies, phytoremediation and/or other technologies are being considered concurrently for use if it is determined based on C. above that an alternate technology will be pursued.*